
(2008) 01 RAJ CK 0079
In the Rajasthan High Court

Prabhu Dayal and Another

APPELLANT

Vs

Radhey Shyam Swami and Others

RESPONDENT

Date of Decision : 07-01-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Specific Relief Act, 1963 — Section 16

Citation : (2008) 01 RAJ CK 0079

Hon'ble Judges : Narendra Kumar Jain, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Narendra Kumar Jain, J.—Heard learned Counsel for both the parties. This civil regular first appeal u/s 96 of the Code of Civil Procedure, on behalf of the plaintiffs, is directed against the impugned judgment and decree dated 16th March 1991 passed by the Additional District & Sessions Judge, Kishangarhbas, District Alwar, in Civil Suit No. 63/1987, whereby the suit of the plaintiffs for specific performance of agreement was dismissed but it was decreed against defendant No. 1 for recovery of a sum of Rs. 32,000/-.

2. Briefly stated, the facts of the case are that the plaintiffs filed a suit for specific performance of agreement dated 01.10.1984 and 21.06.1985 against the defendants in the lower court wherein it was pleaded that defendant No. 2 Mst. Mini Devi was the recorded tenant of agriculture land bearing Khasra No. 435 measuring 4 bigha and 12 biswa situated in village Mundanwara Khurd, Tehsil Mundawar. She had executed a power-of-attorney dated 19.07.1984, which was registered on 21.07.1984, in favour of the defendant No. 1 Radhey Shyam. The defendant No. 1, being a power-of-attorney-holder of defendant No. 2, had agreed to sell the disputed land to the plaintiffs, vide agreement dated 01.10.1984, for a sum of Rs. 80,000/- and accepted part payment thereof i.e. Rs. 32,000/-and handed over the possession of the disputed land on 21.06.1985 after executing another agreement. Thereafter, in pursuance of the terms and

conditions of the agreement dated 21.06.1985, the plaintiffs paid the remaining amount i.e. Rs. 48,000/- to defendant No. 1, the power-of-attorney-holder of defendant No. 2. The defendant No. 1 executed two sale-deeds in the name of plaintiff No. 1 Prabhu Dayal and his son plaintiff No. 2 Rajendra Kumar, for a consideration of Rs. 40,000/- each for half-half share of the disputed land. It was further pleaded that subsequently the defendant No. 2 executed another registered sale-deed in respect of the disputed land in favour of defendant No. 3 on 16.09.1987. It was further pleaded that defendants No. 2 and 3, both, had full knowledge that the disputed property had been purchased by the plaintiffs and they are in possession of the same, but the defendant No. 3, with mala-fide, purchased the said land without value with notice, whereas the plaintiffs are bona-fide purchaser for value without notice. Therefore, it was prayed that a decree of specific performance be passed in favour of the plaintiffs in respect of agreement dated 01.10.1984 and 21.06.1985, and defendants be directed to get the sale- deed dated 26.06.1985 registered in favour of the plaintiffs No. 1 and 2. It was also pleaded that the sale- deed dated 16.09.1987 executed by the defendant No. 2 in favour of the defendant No. 3 be declared null and void and ineffective against the plaintiffs. In alternative, it was also pleaded that in case the suit for specific performance is not decreed then a suit for refund of amount of Rs. 80,000/- with costs of sale-deed etc. be decreed in favour of the plaintiffs.

3. The defendants No. 1 and 2 did not file written- statement in spite of service of summons of suit.

4. The defendant No. 3, the subsequent purchaser of the disputed land, filed his written-statement, wherein he raised his pleas inter alia that the agreement to sell executed in favour of the plaintiffs is forged and the defendant No. 2 rightly sold the disputed land to defendant No. 3 through registered sale-deed dated 16.09.1987. It was also pleaded that the possession of the disputed land was never given to plaintiffs but it was given by defendant No. 2 to defendant No. 3 at the time of execution of registered sale-deed dated 16.09.1987 and at present he is in possession of the disputed land. In the additional pleas, he also pleaded that he is a bona- fide purchaser of the disputed land for value without notice, therefore, no decree of specific performance can be passed against him and the suit of the plaintiffs is liable to be dismissed.

5. On the basis of the pleadings of the parties, the learned trial court framed five issues, which are reproduced in the impugned judgment passed by the trial court. The issue No. 1 is whether the defendant No. 2 had appointed the defendant No. 1 as her power-of-attorney on 19.07.1984 and was he authorized to sell the disputed land. The Issue No. 2 is whether the defendant No. 1, power-of-attorney-holder, on the basis of his rights, agreed to sell the disputed land to the plaintiffs on 01.10.1984 and in pursuance of this agreement to sell, on taking Rs. 32,000/-, as part payment of the sale- consideration, on 21.06.1985 handed over the possession of the disputed land to the plaintiff No. 1 after executing agreement duly attested by the Notary. The Issue No. 3 is whether the plaintiffs

had paid the remaining amount of Rs. 48,000/- on 26.06.1985 to defendant No. 1 and defendant No. 1 had executed two separate sale-deeds for half-half land for a consideration of Rs. 40,000/- each in favour of the plaintiffs No. 1 and 2. The Issue No. 4 is whether the defendant No. 2 had moved an application before the Sub Registrar and due to it the sale-deeds could not be registered in favour of the plaintiffs. The issue No. 5 is whether the defendant No. 2 had executed a sale-deed in respect of the disputed property in favour of the defendant No. 3 on 16.09.1987 and got the same registered without any consideration and mala-fide.

6. In support of their case, the plaintiffs examined PW-1 Prabhu Dayal (the plaintiff No. 1), PW-2 Radhey Shyam (defendant No. 1, the power-of-attorney-holder of defendant No. 2), PW-3 Banwari Lal, PW-4 Lal Singh and PW5 Laxmi Narain, and produced documentary evidence including the agreement-to-sell dated 21.06.1985 (Exhibit-1), two sale-deeds dated 26.06.1985 (Exhibit-2 and 3), agreement dated 01.10.1984 (Exhibit-4) and registered power-of-attorney dated 19.07.1984 (Exhibit-5). The registered sale-deed dated 16.09.1987 in favour of defendant No. 3 was also filed, which was admitted by opposite counsel.

7. The defendant No. 3, in support of his case, examined DW-1 Bhanwar Singh and DW-2 Khushi Ram. The documentary evidence Exhibit A-1 to Exhibit A-6 was also produced on behalf of the defendants.

8. The learned trial court, after considering the submissions of learned Counsel for both the parties and evidence on the record, decided the Issue No. 1 in favour of the plaintiffs and held that defendant No. 2 Mst. Mini Devi had executed a registered power-of-attorney on 19.07.1984 in favour of the defendant No. 1. The issue No. 2 was decided by holding that the agreement dated 01.10.1984 (Exhibit-4) was executed by defendant No. 1 Radhey Shyam in favour of plaintiff Prabhu Dayal after accepting Rs. 32,000/-, but the possession of the disputed land was not handed over to Prabhu Dayal. The Issue No. 3 was decided against the plaintiffs and it was held that remaining amount of Rs. 48,000/- was not paid by the plaintiffs to defendant No. 1 Radhey Shyam. The issue No. 4 was also decided by holding that two sale-deeds (Exhibit-2 and 3) in favour of the plaintiffs were not got registered as the plaintiffs did not make the payment of remaining amount Rs. 48,000/- of sale-consideration to defendant No. 1 Radhey Shyam and thus the said issue was decided against the plaintiffs. Issue No. 5 was also decided in favour of the defendants and against the plaintiffs. Consequently, the trial court dismissed the suit for specific performance but decreed the suit in respect of refund of amount of Rs. 32,000/- against defendant No. 1. Being aggrieved with the same, the present appeal has been preferred on behalf of the plaintiffs.

9. The learned Counsel for the appellants, Shri R.K. Agarwal, contended that the trial court, while deciding Issue No. 2, has held that the agreement dated 01.10.1984 (Exhibit-4) was executed by the defendant No. 1 in favour of the plaintiff and a sum of Rs. 32,000/- was paid by the plaintiff to defendant No. 1, but, so far as the finding on Issue No. 3, about non-payment of remaining

amount of Rs. 48,000/- by the plaintiff to the defendant No. 1 is concerned, the learned trial court committed an illegality in deciding the same against the plaintiff and in favour of the defendants. He contended that payment of Rs. 48,000/- was proved from oral as well as documentary evidence including two sale-deeds (Exhibits-2 and 3) duly signed by defendant No. 1. There is a specific reference of receipt of amount of Rs. 48,000/- in Exhibits No. 2 and 3 by defendant No. 1 from the plaintiffs, therefore, payment of Rs. 48,000/- was made by the plaintiffs and the finding of the trial court in this regard is liable to be set aside. In alternative, he contended that in case the trial court was of the view that the payment of remaining amount of Rs. 48,000/- has not been made then at the most it could have directed that the sale-deeds (Exhibits 2 and 3) will be got registered in favour of the plaintiffs after payment of Rs. 48,000/- by plaintiffs to defendants No. 1 and 2, but decree of specific performance of the agreement could not have been refused. He further contended that the defendants No. 1 and 2 did not file any written-statement denying the contents of the plaint, therefore, execution of Exhibit 1 to Exhibit 4 is fully proved and decree of specific performance ought to have been passed in favour of the plaintiffs. Shri Agarwal, the learned Counsel for the appellants also contended that the defendant No. 3, who is only a subsequent purchaser, had no right to deny the contents of the plaint about execution of the agreements as well as sale-deeds Exhibit-1 to Exhibit-4 as the only plea which was available to him was about his bona-fide purchaser of the disputed land for value without notice. In case he has taken all the pleas including the plea that agreement in favour of plaintiff was never executed or the same is forged then it should be presumed that he is not a bona-fide purchaser and the impugned judgment passed by the trial court is liable to be set-aside and the appeal deserves to be allowed.

10. The learned Counsel for the respondent No. 3, Shri R.K. Mathur, supported the impugned judgment passed by the trial court and contended that the finding of the learned trial court in respect of non-payment of remaining amount of Rs. 48,000/- by plaintiffs to defendant No. 1 is fully justified as the same is based on oral and documentary evidence available in the case and no interference is called for by this Court in the said finding of the trial court. He further contended that the plaintiffs have not pleaded and proved their readiness and willingness to perform the essential terms of the contract i.e. to make the payment of remaining amount of the agreement, as required u/s 16(c) of the Specific Relief Act, 1963, and further that the plaintiffs did not give any notice about their readiness and willingness to perform the term of contract that they are ready and willing to make the payment of remaining amount of Rs. 48,000/-. The learned trial court has rightly recorded a finding that payment of remaining amount of Rs. 48,000/- has not been made to the plaintiffs, the trial court was fully justified in dismissing the suit of the plaintiffs for specific performance of the agreement. He further contended that the defendants No. 1 and 2 did not file any written-statement, therefore, the defendant No. 3 was entitled to take all pleas available to him and also the pleas which were available to defendants No.

1 and 2 as he is the only person who is now affected from the result of this suit/appeal as he purchased the disputed land through registered sale-deed from the recorded tenant of the disputed land i.e. the defendant No. 2 after full payment of sale consideration and at present he is in possession of the land in dispute. He further contended that the land has already been mutated in the revenue record in his favour on the basis of the sale-deed. The revenue record, Exhibit A-1 to Exhibit A-5, have also been placed on the record by him. He also contended that he is a bona-fide purchaser of the land, in dispute, for value without notice and the registered sale-deed executed in his favour is not a fictitious document. The trial court framed Issue No. 5 in respect of registered sale-deed dated 16.09.1987 and the same was rightly decided in his favour. He, therefore, contended that there is no merit in any of the arguments of the learned Counsel for the appellants and the appeal deserves to be dismissed.

11. I have considered the submissions of learned Counsel for both the parties and minutely scanned the impugned judgment as well as the record of the trial court. The trial court, while deciding Issue No. 2, recorded a finding that the agreement dated 01.10.1984 (Exhibit-4) was executed by the defendant No. 1 in favour of the plaintiffs after payment of Rs. 32,000/-, but the possession of the disputed land was not given to plaintiff Prabhu Dayal. The trial court, while deciding the Issue No. 3, has considered the oral and documentary evidence and, after considering the same, has recorded a finding that the plaintiffs did not pay the remaining amount of Rs. 48,000/- of the agreement to the defendant No. 1. It was also held that there was no term in agreement to execute two separate sale-deeds of Rs. 40,000/- each, in favour of plaintiffs No. 1 and 2. I myself examined the oral and documentary evidence available on the record and, after close scrutiny thereof, particularly the statement of PW-1 Prabhu Dayal, the plaintiff No. 1, and the statement of PW-2 Radhey Shyam, the defendant No. 1, I find that PW-1 Prabhu Dayal, the plaintiff No. 1 himself, has not stated in his statement that he paid Rs. 48,000/- to defendant No. 1 Radhey Shyam. PW-2 Radhey Shyam was defendant No. 1 but he was examined on behalf of the plaintiff and he also stated that the remaining amount of the agreement i.e. Rs. 48,000/- was not paid to him by plaintiff Prabhu Dayal. The finding of the trial court in this regard appears to be justified based on the evidence on the record and I do not find any illegality in it so as to interfere therein. It is relevant to mention that as per Section 16(c) of the Specific Relief Act, 1963, it was a duty of the plaintiff to plead and prove that he was ready and willing to perform the essential terms of the contract, which were required to be performed by him. The plaintiff has not pleaded that he was ready and willing to pay Rs. 48,000/- or he made any effort to pay the same. The case of the plaintiff is that he paid Rs. 48,000/- on 26.06.1985 and got two sale-deeds (Exhibits-2 and 3) executed from the defendant No. 1. There was no agreement to get two sale-deeds executed of Rs. 40,000/- each in favour of both plaintiffs separately, and it was contrary to the term of the agreement dated 01.10.1984 as well as 21.06.1985. The agreement dated 01.10.1984 further shows that it was not executed by the

defendant No. 1 in the capacity of power-of-attorney-holder of defendant No. 2. The sale-deeds (Exhibits-2 and 3) were executed but these were executed without consideration and from the evidence on the record it is clear that the remaining amount of Rs. 48,000/- was not paid by the plaintiff to defendant No. 1. In these circumstances, it is clear that the appellants were neither ready and willing nor they paid the remaining amount of Rs. 48,000/- and the learned trial court rightly recorded a finding in respect of Issue No. 3 in favour of the defendants and against the plaintiffs.

12. The defendant No. 3 purchased the disputed property from the original owner i.e. defendant No. 2, through registered sale-deed and he is in actual physical possession of the same. The land has been mutated in the revenue record in his favour on the basis of registered sale-deed. So far as the defendants No. 1 and 2 are concerned, it is apparent that the defendant No. 1 received part payment of the contract amount from the plaintiffs and the defendant No. 2 received full sale- consideration from the defendant No. 3 and, in spite of service of summon of suit, they did not file any written- statement nor they have appeared before this Court in spite of service of notice of appeal. It is only the defendant No. 3, who is directly interested and affected party in the present case and he is the only person who will be aggrieved in case the plaintiffs' suit for specific performance of the contract is decreed. In these circumstances, I am of the view that apart from a plea that he is a bona-fide purchaser of the disputed land for value without notice, the defendant No. 3 is entitled to raise all other pleas which are available to the defendants No. 1 and 2 to contest the suit including a plea that the plaintiffs were not ready and willing to perform the essential term of the contract. I do not find any force in the contention of the learned Counsel for the appellants that the defendant No. 3 cannot be allowed to raise any other plea except that he is a bona-fide purchaser of the disputed land for value without notice. A reference may also be given in this regard to a decision of the Hon''ble Apex Court in the case of Ram Awadh (Dead) by Lrs. and Others Vs. Achhaibar Dubey and Another, , wherein the Hon''ble Apex Court overruled its earlier decision in the case of Union of India (UOI) and Others Vs. G. Vasudevan Pillay and Others, , and held that the subsequent purchaser of the property or his legal representatives, who were defendants in the suit, were entitled to raise a plea that the plaintiff was never ready and willing to perform his part of the contract. Para 6 of the judgment in Ram Awadh's case (supra) reads as under:

6. The obligation imposed by Section 16 is upon the court not to grant specific performance to a plaintiff who has not met the requirements of Clauses (a), (b) and (c) thereof. A court may not, therefore, grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one defendant and not to another. It is open to any defendant to contend and establish that the mandatory requirement of Section 16(c) has not been

compliedwith and it is for the court to determine whether it has or has not been compliedwith and, depending upon its conclusion, decree or decline to decree the suit. We are of the view that the decision in Union of India (UOI) and Others Vs. G. Vasudevan Pillay and Others, is erroneous.

13. In view of the above discussion, I do not find any force in any of the contentions of the learned Counsel for the appellants and the appeal deserves to be dismissed, which is hereby dismissed with no order as to costs.